Supreme Court, U.S.
FILED
DEC 14 2010
OFFICE OF THE CLERK

No. 10-476

In the Supreme Court of the United States

VARSHA MAHENDER SABHNANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner had not shown that pretrial publicity was so pervasive as to require the court to presume that publicity prejudicially affected the jury, even after a full voir dire and in the absence of any evidence of such prejudice.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Daniels v. *Woodford*, 428 F.3d 1181 (2005), cert. denied, 550 U.S. 968 (2007) 20
DeRosa v. *State*, 89 P.3d 1124 (Okla. Crim. App. 2004), cert. denied, 543 U.S. 1063 (2005) 20
Dobbert v. *Florida*, 432 U.S. 282 (1977) 10
Estes v. *Texas*, 381 U.S. 532 (1965) 9, 14
Flamer v. *Delaware*, 68 F.3d 736 (3d Cir. 1995), cert. denied, 516 U.S. 1088 (1996) 20
Hamilton v. *Ayers*, 583 F.3d 1100 (9th Cir. 2009) 20
Irvin v. *Dowd*, 366 U.S. 717 (1961) 17
Marshall v. *United States*, 360 U.S. 310 (1959) 13, 14
Mayola v. *Alabama*, 623 F.2d 992 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981) 10
Mu'Min v. *Virginia*, 500 U.S. 415 (1991) 11, 15, 19
Murphy v. *Florida*, 421 U.S. 794 (1975) ..... *passim*
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 10
Neder v. *United States*, 527 U.S. 1 (1999) 20
Patton v. *Yount*, 467 U.S. 1025 (1984) 11
People v. *Leonard*, 157 P.3d 973 (Cal.), cert. denied, 552 U.S. 1013 (2007) 20

Cases—Continued: Page

Rideau v. *Louisiana*, 373 U.S. 723 (1963) 8, 13, 16
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 9, 10, 14
Skilling v. *United States*, 130 S. Ct. 2896 (2010) ... *passim*
Stroble v. *California*, 343 U.S. 181 (1952) 15
United States v. *Campa*, 459 F.3d 1121 (11th Cir. 2006), cert. denied, 129 S. Ct. 2790 (2009) 10
United States v. *Childress*, 58 F.3d 693 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996) 10
United States v. *Higgs*, 353 F.3d 281 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004) 20
United States v. *Keating*, 147 F.3d 895 (9th Cir. 1998) .. 20
United States v. *Lane*, 474 U.S. 438 (1986) 13
United States v. *Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) 13
United States v. *McVeigh*, 153 F.3d 1166 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999) 10, 20
United States v. *Mechanik*, 475 U.S. 66 (1986) 13
United States v. *Rewald*, 889 F.2d 836 (9th Cir. 1989), cert. denied, 498 U.S. 819 (1990) 14
United States v. *Rodriguez*, 581 F.3d 775 (8th Cir. 2009), cert. denied, 131 S. Ct. 413 (2010) 14
United States v. *Sabhnani*:
493 F.3d 63 (2d Cir. 2007) 3
529 F. Supp. 2d 384 (E.D.N.Y. 2008) 6
539 F. Supp. 2d 617 (E.D.N.Y. 2008) 5, 17
United States v. *Skilling*, 554 F.3d 529 (5th Cir. 2009), aff'd in part and vacated in part, 130 S. Ct. 2896 (2010) 18

Cases—Continued: Page

United States v. *Volpe*, 42 F. Supp. 2d 204 (E.D.N.Y. 1999) 4, 5
United States v. *Yousef*, 327 F.3d 56 (2d Cir. 2004) .. 4, 5, 6

Constitution, statutes, and rules:

U.S. Const.:
Amend. V (Due Process Clause) 13
Amend. VI 7
8 U.S.C. 1324(a)(1)(A)(iii) 2
8 U.S.C. 1324(a)(1)(A)(v)(II) 2
8 U.S.C. 1324(a)(1)(B)(iii) 2
18 U.S.C. 2 2
18 U.S.C. 1581(a) 2
18 U.S.C. 1589 2
18 U.S.C. 1592(a) 2
18 U.S.C. 1594(a) 2
28 U.S.C. 112(c) 15
Fed. R. Crim. P.:
Rule 21 ..... 7, 13, 14
Rule 21(a) 4, 7, 14
Rule 33 5
Rule 52(a) 13

Miscellaneous:

United States Census Bureau, *No. CO-EST2009-01-36, Annual Estimates of the Resident Population for Counties of New York: April 1, 2000 to July 1, 2009* (Mar. 2010), http://www.census.gov/popest/counties/tables/CO-EST2009-01-36.xls 15

In the Supreme Court of the United States

No. 10-476

VARSHA MAHENDER SABHNANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-86a) is reported at 599 F.3d 215. The memorandum and order of the district court denying petitioner's motion to change venue (Pet. App. 87a-96a) is not published in the Federal Supplement, but is available at 2007 WL 2769487. The memoranda and orders of the district court denying petitioner's post-trial motions are reported at 539 F. Supp. 2d 617 and 529 F. Supp. 2d 384.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2010. A petition for rehearing was denied on May 12, 2010 (Pet. App. 97a). On July 16, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 11,

2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a seven-week jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of two counts of forced labor, in violation of 18 U.S.C. 1589, 1594(a) and 2; two counts of harboring an alien involving serious bodily injury, in violation of 8 U.S.C. 1324(a)(1)(A)(iii), (a)(1)(A)(v)(II) and (a)(1)(B)(iii); two counts of peonage, in violation of 18 U.S.C. 1581(a), 1594(a) and 2; two counts of document servitude, in violation of 18 U.S.C. 1592(a), 1594(a) and 2; and separate counts of conspiracy to commit each of the substantive offenses. Pet. App. 2a, 17a-18a. Petitioner was sentenced to 132 months of imprisonment, to be followed by three years of supervised release; to pay a $25,000 fine and a special assessment of $1200; and to pay restitution. *Id.* at 2a. The court of appeals affirmed the conviction, vacated the restitution order, affirmed the remainder of the sentence, and remanded for recalculation of the amount of restitution. *Id.* at 1a-86a.

1. These convictions stemmed from petitioner's relationship with, and treatment of, two Indonesian domestic servants, Samirah and Enung, who were kept in a state of servitude and forced to labor in petitioner's residence. Pet. App. 3a-18a. On May 14, 2007, petitioner and her husband and co-defendant, Mahender Sabhnani, were arrested and held on a charge of committing forced labor. They were detained for three days and then released on bail. On May 22, 2007, they were arraigned on an indictment charging them with two counts of forced labor and two counts of harboring aliens. *Id.* at 88a.

The government and the defendants then engaged in extensive litigation on the issue of bail, including numerous written filings, oral argument, and other conferences in the district court, and an appeal and oral argument in the court of appeals. Pet. App. 89a-90a; *United States* v. *Sabhnani*, 493 F.3d 63, 66-74 (2d Cir. 2007). On August 21, 2007, the district court released the defendants to home confinement subject to certain conditions.[1] Pet. App. 90a.

Numerous media outlets reported the news of the defendants' initial arrest, the nature of the charges against them, and their first bail hearing. See Pet. App. 120a-124a, 128a-132a, 194a, 197a (media coverage between May 16, 2007, and May 18, 2007). *Newsday*, the daily Long Island newspaper, routinely covered the status of the protracted bail proceedings. See *id.* at 141a-145a, 148a-151a, 155a-165a, 170a-173a, 176a, 179a-184a (articles printed between May 20, 2007, and June 28, 2007). The Associated Press and, to a lesser extent, the *New York Times* occasionally reported on various aspects of the case, see *id.* at 134a-137a, 152a-154a, 164a-169a, 174a-175a, 177a-178a, 181a-182a, 208a-214a (articles printed between May 20, 2007, and June 28, 2007), as did various television, radio and internet outlets, see *id.* at 194a-207a, 215a-217a. One news outlet, the *New York Post*, in addition to reporting on the status of the case, portrayed the defendants in a particularly unflattering light: the newspaper dubbed petitioner "Cruella"

[1] Following the indictment, the district court had denied bail on the ground that the defendants were flight risks. On appeal, the Second Circuit upheld the finding that the defendants posed a flight risk, but vacated the detention order on the ground that there were bail conditions that could reasonably assure the defendants' presence at trial. *Sabhnani*, 493 F.3d at 68, 72-73, 75-78.

(*id.* at 19a), published dramatic accounts of the alleged crimes, and reported further allegations by the son of one of the victims, drawn from a statement read in court. See *id.* at 133a, 138a-140a, 146a-147a (three articles printed between May 19, 2007, and June 7, 2007).

2. The defendants moved for a change of venue, pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure. They alleged that the pre-trial publicity surrounding their case was so pervasive and inflammatory that they could not receive a fair trial, and that the government was responsible for generating some of that pretrial publicity. Pet. App. 92a-93a; see, *e.g.*, *id.* at 221a-223a. In support of their motion, they submitted various newspaper articles and examples of radio and television coverage. *Id.* at 92a; see *id.* at 117a-217a, 232a-262a.

The district court denied the motion. Pet. App. 87a-96a. The court found that the defendants had "not shown that the pretrial publicity in this case [was] sufficiently prejudicial and inflammatory or that it [had] so permeated [the] district that a fair trial [could not] be had." *Id.* at 93a. The court further concluded that "the vast majority of media coverage ha[d] coincided with the court proceedings" and, thus, "amount[ed] to no more than the press reporting the news of the day." *Id.* at 95a. Indeed, the court noted, "requests for transfers of venue have been denied in cases far more notorious than [this one]," such as the World Trade Center bombing prosecution and the case against police officers accused of sodomizing Abner Louima with a toilet plunger. *Ibid.* (citing *United States* v. *Yousef*, 327 F.3d 56, 155 (2d Cir. 2004), and *United States* v. *Volpe*, 42 F. Supp. 2d 204, 218 (E.D.N.Y. 1999)). The court accordingly concluded that a "searching" and "thorough" voir dire would be the

appropriate way to prevent pretrial publicity from affecting the jury. *Id.* at 95a-96a (quoting *Yousef*, 327 F.3d at 155, and *Volpe*, 42 F. Supp. 2d at 218). As for the allegation that the government was responsible for generating the pretrial publicity, the court "f[ound] that the government did not purposefully generate negative publicity about the defendants" and that the government's statements had been properly made in the context of the bail hearings "to support [the government's] contentions" that the defendants presented a flight risk and a danger to the community. *Id.* at 93a. Indeed, the court concluded that the defendants' attorneys had contributed to the publicity, by their conduct resulting in "additional and unnecessary court proceedings," with attendant press coverage, and by attacking the victims in the media. *Id.* at 94a; see *id.* at 93a-95a & n.6.

The jury found petitioner and her husband guilty on all counts.[2]

---

[2] Following the verdict, petitioner moved for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and again raised the issue of prejudicial pretrial publicity. The district court denied the motion. *United States* v. *Sabhnani*, 539 F. Supp. 2d 617, 627-628 (E.D.N.Y. 2008). The court noted that petitioner did not seek to show that any juror had actually viewed any media coverage of the trial, contrary to the court's instructions; rather, petitioner contended that the jurors would likely have been exposed to the news stories given the amount of coverage. *Id.* at 628. The court noted that it had instructed the jury daily not to read *Newsday* at all, not to watch the Long Island news channel at all, and to avoid all media coverage or discussion about the case. The court also noted that it had specifically inquired about the jurors' exposure to particular news articles that the defense brought to its attention. The court concluded that there was no evidence that any juror had failed to follow the court's daily instructions, no evidence that any juror had been actually exposed to any publicity, and no evidence of prejudice to the defendants. *Ibid.* The district court separately denied a new trial based on the defendants' assertions of juror

3. The court of appeals affirmed in relevant part. Pet. App. 1a-86a.

The court of appeals agreed with the district court that the government's statements describing the nature of the crime and personal characteristics of the defendants during the bail proceedings were proper in the context in which they were made. Pet. App. 20a. The court also concluded that the "pretrial publicity here was not so pervasive and prejudicial as to have created a reasonable likelihood that a fair trial could not be conducted." *Id.* at 20a-21a. The court noted both that five months had passed between the most inflammatory news coverage and the start of trial, and that the majority of the press coverage had "tracked the frequent court proceedings in this case." *Id.* at 21a. The court reasoned that "[c]overage of actual developments in a criminal case generally will not rise to the level of prejudicial publicity that will warrant a venue change." *Ibid.* Finally, the court recognized the distinction between "mere exposure to pretrial publicity and actual prejudgment by the venire of the issues to be decided in the case." *Ibid.* The court noted that cases in which a presumption of prejudice may be applied "are very rare" (*id.* at 22a), and ultimately concluded that such a presumption did not apply in this case. *Id.* at 24a. The court also concluded that petitioner had failed to establish *actual* bias among the venire. *Id.* at 22a-23a. The court explained that "in the context of the appeal from a conviction involving crimes far more notorious than [the defendants'] case, * * * 'the key to determining the appropriateness of a change of venue is a searching voir dire.'" *Id.* at 23a (quoting *Yousef*, 327 F.3d at 155).

---

misconduct. *United States* v. *Sabhnani*, 529 F. Supp. 2d 384 (E.D.N.Y. 2008).

And the court noted that the defendants did not challenge the sufficiency of the voir dire on appeal. *Ibid.*

ARGUMENT

Petitioner contends that review is warranted here because pretrial publicity created a presumption of prejudice such that she was denied an impartial jury. Petitioner principally relies on this Court's decision in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), which held that negative publicity before the defendant's trial did *not* raise a presumption of jury prejudice. According to petitioner, *Skilling* justifies further review here because it "clarified" the circumstances in which pretrial publicity requires such a presumption to attach. Pet. 17. That contention lacks merit, because this Court in *Skilling* set out no new rule but simply applied established law to the facts of that case. Because the decision below is correct and does not conflict with *Skilling*, with any other decision of this Court, or with any decision of another court of appeals, further review is not warranted.

1. "The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury." *Skilling*, 130 S. Ct. at 2912-2913. As one means of protecting that right, Rule 21 of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court must transfer the proceeding * * * to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a).

If the district court denies transfer under Rule 21 and the defendant seeks to establish on appeal that pretrial publicity deprived him of a fair trial, the defendant must ordinarily establish that, despite the protections

afforded during the jury-selection process, publicity actually affected the jury that was seated. Petitioner contends that in this case such prejudice should be presumed simply from the volume and nature of the pretrial publicity. But this Court's decisions have made clear that a presumption of prejudice could apply only in "the extreme case." *Skilling*, 130 S. Ct. at 2915. Indeed, this Court has seen only *one* case in 50 years in which the unique circumstances justified reversal based on pretrial publicity alone. Even in cases involving extraordinary pretrial publicity *and* other circumstances affecting the trial itself, this Court has presumed prejudice only where a "conviction [was] obtained in a trial atmosphere that had been utterly corrupted by press coverage." *Murphy* v. *Florida*, 421 U.S. 794, 798 (1975). The pretrial publicity in this case does not approach that level.

The sole case in which this Court has reversed a conviction based *only* on pretrial publicity, without proof of an actual effect on the jury, is *Rideau* v. *Louisiana*, 373 U.S. 723 (1963). Rideau was interrogated in his jail cell, without counsel, by the local sheriff. He confessed to kidnapping and murdering a bank employee. A 20-minute film of the interrogation and confession aired three times on local television, before audiences of 24,000, 53,000, and 20,000 viewers, in a community of only 150,000 people. *Id.* at 723-727. The Court explained that "to the tens of thousands of people who saw and heard it," the televised interview "in a very real sense *was* Rideau's trial—at which he pleaded guilty." *Id.* at 726. The Court held that due process "required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" *Id.* at 727.

Petitioner's other cases involved media presence in the courtroom, not the effect of conventional media coverage. In *Estes* v. *Texas*, 381 U.S. 532 (1965), the Court held that the defendant was denied due process by the "televising and broadcasting of his trial." *Id.* at 535. The media invaded the courtroom, causing "considerable disruption," and filmed large portions of the trial as well as a pretrial hearing involving, inter alia, jury selection. *Id.* at 536, 550-551. The Court concluded that the media had "bombard[ed] * * * the community with the sights and sounds of" the pretrial hearing, which "led to considerable disruption" and denied the defendant the "judicial serenity and calm to which [he] was entitled." *Id.* at 536. This Court therefore reversed the conviction without assessing the prejudicial impact on individual jurors, reasoning that the effect of television on the proceedings could be presumed and justify reversal under what the Court called "the rule announced in *Rideau*." *Id.* at 550. *Estes* thus dealt not with pretrial publicity alone—indeed, a change of venue had been granted on that basis, *id.* at 536—but with the "circus atmosphere" at trial. *Murphy*, 421 U.S. at 799.

Finally, in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the media not only reported numerous prejudicial rumors and accusations regarding the defendant, who was accused of murdering his pregnant wife, but also was allowed to invade the courtroom and interfere with the trial itself. *Id.* at 342-345, 356-357. The Court found that "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," and that the trial court failed to take adequate steps to avoid the "carnival atmosphere at trial." *Id.* at 355, 358-363; see *Murphy*, 421 U.S. at 798 (proceedings

in *Estes* and *Sheppard* "were entirely lacking in the solemnity and sobriety to which a defendant is entitled").

As is clear from this Court's precedents, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 554 (1976); see also *Sheppard*, 384 U.S. at 354, 358 (noting that "months [of] virulent publicity about Sheppard and the murder" did not alone deny due process; due process issue arose from the "carnival atmosphere" that pervaded the trial). Indeed, the Court recognized in *Skilling* that its decisions in *Rideau*, *Estes*, and *Sheppard* "cannot be made to stand for the proposition that juror exposure to * * * news accounts of the crime * * * alone presumptively deprives the defendant of due process." 130 S. Ct. at 2914 (quoting *Murphy*, 421 U.S. at 798-799). Thus, to the extent that a defendant can ever establish presumptive prejudice from pretrial publicity alone, he has an "extremely high" burden, *United States* v. *McVeigh*, 153 F.3d 1166, 1182 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999), because a presumption of prejudice is only "'rarely' applicable and is reserved for an 'extreme situation,'" *United States* v. *Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc) (quoting *Mayola* v. *Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981)), cert. denied, 129 S. Ct. 2790 (2009). Accord *United States* v. *Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995) (presumption is "reserved for only the most egregious cases"), cert. denied, 516 U.S. 1098 (1996); see also *Dobbert* v. *Florida*, 432 U.S. 282, 303 (1977) ("Unfairness of constitutional magnitude" will not be presumed "in the absence of a 'trial atmosphere * * * utterly corrupted by press coverage.'") (quoting *Murphy*, 421 U.S. at 798).

2. Contrary to petitioner's contention (Pet. 17), *Skilling* did not "clarif[y]" the circumstances in which a presumption of prejudice applies; nor did the Court establish a new test (Pet. 18-21) for courts of appeals to apply when evaluating potential prejudice from pretrial publicity. Rather, the Court in *Skilling* followed its longstanding approach to evaluating alleged prejudice from pretrial publicity and concluded that the facts in *Skilling* did not warrant a presumption of prejudice—just as it has concluded in every pretrial-publicity case since *Rideau*. See, *e.g.*, *Murphy*, *supra*; *Patton* v. *Yount*, 467 U.S. 1025 (1984); *Mu'Min* v. *Virginia*, 500 U.S. 415 (1991).

In *Skilling*, the Court initially noted that reliance on *Estes* and *Sheppard* was "particularly misplaced," because those cases "involved media interference with courtroom proceedings *during* trial."[3] 130 S. Ct. at 2915 n.14. The only relevant authority on presumed prejudice therefore was *Rideau*, which the Court found readily distinguishable. The most obvious difference, the Court noted, was the "size and characteristics of the community" in which Skilling's crime was committed (*i.e.*, Houston, "the fourth most populous city in the Nation"), as compared to the community of 150,000 in which Rideau's crime was committed. *Id.* at 2915. The Court also recognized that, while the news accounts about Skilling "were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* at 2916. In essence, no "evidence of the smoking-gun variety" threatened to cause the jury to prejudge Skilling's culpability. *Ibid.*

[3] Like the defendant in *Skilling*, petitioner here does not assert that news coverage affected the jury after it was empanelled.

The Court also noted that Skilling's trial took place four years after the collapse of Enron, and that Skilling was acquitted on some charges. *Ibid.* Considering those facts, the Court concluded that Skilling's prosecution "share[d] little in common with those in which * * * a presumption of juror prejudice" has attached. *Ibid.* The Court re-emphasized that the media coverage "did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice," and noted that the "size and diversity" of the community in which the crime took place "diluted the media's impact." *Ibid.*

3. The court of appeals' decision does not conflict with *Skilling* or any other decision of this Court.[4] The court of appeals applied the appropriate standard, and its conclusions—that the complained-of pretrial publicity "was not so pervasive and prejudicial as to have created a reasonable likelihood that a fair trial could not be conducted" (Pet. App. 21a) and that the record "does not establish that the venire had prejudged the [defendants'] case" (*id.* at 22a)—were correct. In the context of this factual record, it was not necessary for the court of appeals' decision to address expressly every one of the factors this Court thereafter identified in differentiating *Skilling* from *Rideau*, nor would re-examination of this case in light of *Skilling* change the outcome. Further review is not warranted.

"A presumption of prejudice * * * attends only the extreme case," *Skilling*, 130 S. Ct. at 2915, and peti-

[4] Petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals. Cf. pp. 17-21, *infra* (discussing petitioner's contention that there is a circuit conflict on an issue never addressed by the court of appeals here).

tioner's case is hardly "extreme."[5] To the contrary, this case involves none of the extraordinary facts—*e.g.*, a televised jailhouse confession that turned the ensuing trial into a "kangaroo court proceeding[ ]," *Rideau*, 373 U.S. at 726—that led this Court to hold, in a single case nearly 50 years ago, that prejudice could be presumed from pretrial publicity alone.[6] *Ibid.*

---

[5] Indeed, venue changes have been denied in far more notorious cases. See Pet. App. 95a (citing cases); *United States* v. *Lindh*, 212 F. Supp. 2d 541, 549-551 (E.D. Va. 2002) (John Walker Lindh, American captured fighting for the Taliban); see also *Skilling*, 130 S. Ct. at 2914 n.12 (discussing the notoriety of the defendant in *Murphy*, a jewel thief and murderer).

[6] Petitioner is incorrect in suggesting (Pet. 24-25) that her reliance on Rule 21 in addition to the Due Process Clause either bolsters her claim of reversible error or makes this case a more suitable vehicle for plenary review by this Court. Petitioner's premise (Pet. 25) is that "Rule 21 is more protective than the Due Process Clause," for which proposition he cites statements in *Marshall* v. *United States*, 360 U.S. 310 (1959) (per curiam), in Chief Justice Burger's concurring opinion in *Murphy* v. *Florida*, 421 U.S. 794, 804 (1975), and in the dissenting opinion in *Rideau*, see 373 U.S. at 728 (Clark, J., dissenting) (explaining that he would reverse in a federal case because he did "not believe it within the province of law enforcement officers actively to cooperate in activities which tend to make more difficult the achievement of impartial justice"). But even if Rule 21 *permits* a district court to grant a venue transfer when the Due Process Clause does not require it, the district court declined to order such a transfer here, and nothing in the cases petitioner cites establishes that the district court abused its discretion or that the court of appeals' application of the deferential standard of review to the facts of this case warrants further consideration in this Court. See generally *Skilling*, 130 S. Ct. at 2913 n.11 ("As the language of [Rule 21] suggests, district-court calls on the necessity of transfer are granted a healthy measure of appellate-court respect."). And even if discretion under the Rule were abused, petitioner cannot plausibly claim that a violation of that federal rule of procedure is subject to an irrebuttable presumption of prejudice. See Fed. R. Crim. P. 52(a); cf. *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986); *United*

First, petitioner does not—and cannot—allege that media representatives "overran the courtroom and 'bombard[ed] * * * the community with the sights and sounds of'" the court proceedings, *Estes*, 381 U.S. at 538, or that publicity created a "carnival atmosphere" that pervaded the trial, *Sheppard*, 384 U.S. at 358. Petitioner's reliance on *Estes* and *Sheppard* thus is "particularly misplaced." *Skilling*, 130 S. Ct. at 2915 n.14.

Second, the jury was selected from the broad and diverse Eastern District of New York, not from a small jurisdiction (like the single parish in *Rideau*) in which pretrial publicity truly could saturate the jury pool. While petitioner states that the crime occurred in a "small suburban community" and that the trial took place "more than 50 miles from the federal courthouses in Manhattan and Brooklyn," Pet. 21-22 n.3, the relevant fact is that the *venire* was drawn from the entire Eastern District—*i.e.*, Long Island (Nassau and Suffolk Counties) and the New York City boroughs of Brooklyn,

---

States v. *Lane*, 474 U.S. 438, 449 (1986). In any event, the federal courts of appeals have read Rule 21(a) as consistent with this Court's constitutional venue jurisprudence. See *United States* v. *Rodriguez*, 581 F.3d 775, 788 (8th Cir. 2009), cert. denied, 131 S. Ct. 413 (2010); *United States* v. *Rewald*, 889 F.2d 836, 862 n.27 (9th Cir. 1989), cert. denied, 498 U.S. 819 (1990). Compare *Sheppard*, 384 U.S. at 363 (explaining that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should * * * transfer [the case] to another [district] not so permeated with publicity"), with Fed. R. Crim. P. 21(a) (directing trial court to transfer case if prejudice exists such that "the defendant cannot obtain a fair and impartial trial"). By contrast, neither the Court's opinion in *Marshall* nor Chief Justice Burger's concurrence in *Murphy* dealt with Rule 21 at all. Moreover, the Court in *Marshall* reversed a conviction based on the *actual* "exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence." 360 U.S. at 312.

Queens, and Staten Island (Kings, Queens, and Richmond Counties)—whose total population is more than 8 million people. See 28 U.S.C. 112(c); United States Census Bureau, *No. CO-EST2009-01-36, Annual Estimates of the Resident Population for Counties of New York: April 1, 2000 to July 1, 2009* (Mar. 2010), http://www.census.gov/popest/counties/tables/CO-EST2009-01-36.xls. Indeed, four of those five counties (all but Richmond) are among the Nation's 30 largest by population. Just as in *Skilling* (in which the trial took place in Houston), the "large, diverse pool of potential jurors" refutes "the suggestion that 12 impartial individuals could not be empanelled." *Skilling*, 130 S. Ct. at 2915; accord *Mu'Min*, 500 U.S. at 429 (potential for prejudice mitigated by the size of the "metropolitan Washington [D.C.] statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year").

Third, despite petitioner's efforts (Pet. 19-20) to characterize the publicity in this case as "unrelenting," and including "superheated rhetoric" about crimes that are "likely to evoke an intensely visceral response," the facts show otherwise. The media coverage "contained no confession," no "evidence of the smoking-gun variety," and no "blatantly prejudicial information of the type [New York] readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 130 S. Ct. at 2916; cf. *Stroble* v. *California*, 343 U.S. 181, 192 (1952) (no prejudice despite newspapers discussing the "manhunt" for accused murderer of six-year old and characterizing defendant as a "werewolf," "fiend," and "sex-mad killer"). True, some of the articles were "not kind." *Skilling*, 130 S. Ct. at 2916. But the principal coverage in petitioner's case "amount[ed] to no more than the

press reporting the news of the day." Pet. App. 95a; accord *id.* at 21a ("[T]he record here indicates, as the district court found, that most of the press coverage tracked the frequent court proceedings in this case."). The facts to which petitioner objects, about her wealth and the nature of her crimes, were relevant to the bail and home-detention proceedings and were reported in that context. The routine, if colorful, news coverage of filings and hearings in the case hardly rivals the volume of coverage even in *Skilling*, which extended even to the local newspaper's sports section and pet column. 130 S. Ct. at 2911 n.8.

Fourth, unlike *Rideau*, in which the defendant's trial began less than eight weeks after his confession was repeatedly aired on television, see 373 U.S. at 1420 (Clark, J., dissenting), several months separated the bulk of the most inflammatory press coverage (which followed petitioner's arrest and initial appearance) from petitioner's trial. Cf. *Murphy*, 421 U.S. at 802 (rejecting claim that jury was influenced where the majority of news articles concerning defendant appeared seven months before jury selection). As in *Skilling*, the "decibel level of media attention diminished" in the months following petitioner's arrest. 130 S. Ct. at 2916.

Finally, petitioner makes too much of her conviction on all charged counts (Pet. 17, 19, 21, 31). In *Skilling*, in which the jury had acquitted on several counts, this Court observed that "[i]t would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." 130 S. Ct. at 2916. But petitioner's converse proposition does not follow: the mere fact of conviction does not affirmatively *support* a presumption that the jury was prejudiced. Conviction on all counts is not evidence of bias when the

defendant is, in fact, proved guilty beyond a reasonable doubt. That was the case here: petitioner's guilt was proved by "credible" and "compelling direct evidence" that was corroborated by other witnesses. *United States* v. *Sabhnani*, 539 F. Supp. 2d 617, 625, 627 (E.D.N.Y. 2008); see *id.* at 620-622, 624-626.

As the Court reiterated in *Skilling*, an event's "[p]rominence does not necessarily produce prejudice, and juror *impartiality* * * * does not require *ignorance*." 130 S. Ct. at 2914-2915. See also *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961) (explaining that jurors are not required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case"). Petitioner has shown at most that her case was the subject of public attention; she cannot show that it was the extreme situation in which every one of the millions of potential jurors must be presumed to be prejudiced beyond the ability of voir dire to discover (Pet. 24).

The court of appeals did not misapply this Court's precedents in declining to afford such a presumption on these facts. Nor did the Court's decision in *Skilling* cast any doubt on the court of appeals' intensely fact-bound analysis; the court of appeals rejected petitioner's claim for reasons quite similar to those this Court gave in rejecting Skilling's claim. Accordingly, this Court should reject petitioner's suggestion (Pet. 30-32) that the Court grant the petition, vacate the judgment, and remand for further consideration in light of *Skilling*.

4. Petitioner suggests (Pet. 26-30) that this Court should grant review to consider whether a presumption of jury prejudice is rebuttable. That issue was not addressed in either of the lower courts, because both

courts correctly found that this case does not call for the application of such a presumption at all. There is no occasion for this Court to address that issue in the first instance. Even if this Court were to address the question, petitioner still would not be entitled to reversal.

As petitioner notes (Pet. 26), this Court granted certiorari in *Skilling* to decide (inter alia) whether a presumption of prejudice may be rebutted. Pet. for Cert. at i, *Skilling*, *supra* (No. 08-1394). But that case, unlike this one, presented a plausible vehicle to address the question: in *Skilling* the court of appeals had concluded that a presumption of prejudice *did* apply, and then proceeded to hold that the presumption could be, and had been, rebutted. See *United States* v. *Skilling*, 554 F.3d 529, 559, 561-565 (5th Cir. 2009), aff'd in relevant part on other grounds, 130 S. Ct. 2896 (2010). The government explained in its brief in opposition to certiorari that the court of appeals had erred in applying the presumption in the first place, and that *Skilling* therefore would not be an appropriate vehicle for this Court to consider whether the presumption was rebuttable. U.S. Br. in Opp. at 13-17, *Skilling*, *supra* (No. 08-1394). And that proved to be the case: this Court concluded that no presumption of prejudice was warranted, and it therefore did not reach the question on which it had granted certiorari. See 130 S. Ct. at 2917 & n.18; accord *id.* at 2952-2953 (Sotomayor, J., concurring in part and dissenting in part).

In this case, by contrast, no court has addressed the question whether a presumption, if applied, could be rebutted. Indeed, the court below has never decided that question in any case. See Pet. 26-27. And no court has had the opportunity to evaluate the government's evidence that the thorough voir dire in this case did, in

fact, ensure petitioner an unbiased jury. Indeed, this Court should not decide the question whether the presumption of prejudice is so strong that *no* voir dire could cure it without having before it a developed record and reasoned decision on what curative efforts were made in the particular case. This case involved a thorough and searching voir dire, involving a 38-page juror questionnaire and three days of jury selection, see Gov't C.A. Br. 62, which the court of appeals did not have occasion to address because it concluded that no presumption of prejudice should apply.

In any event, an irrebuttable presumption cannot be justified under this Court's cases, and petitioner significantly overstates the support in the lower courts for such a rule. The mere fact that jurors were exposed to pretrial publicity is not itself a constitutional violation, see, *e.g.*, *Skilling*, 130 S. Ct. at 2914; *Murphy*, 421 U.S. at 798-799, unless the exposure actually affects the jury's impartiality. And even if, in an extreme case, the defendant can be relieved of the burden of demonstrating such an effect, no constitutional violation has occurred if the government can show by satisfactory proof that, in fact, the jury was not affected. The trial court is in the best position to evaluate that proof in the first instance, through voir dire. See, *e.g.*, *Mu'Min*, 500 U.S. at 427 (emphasizing that, "[p]articularly with respect to pretrial publicity," "primary reliance on the judgment of the trial court" to determine juror bias "makes good sense"). Thus, although the Court has occasionally suggested that a presumption of prejudice means that jurors' claims of impartiality "should not be believed," *id.* at 429, those statements are properly read to mean only that when pretrial publicity is particularly intense, the district court should conduct a more searching inquiry

than usual and closely scrutinize juror claims of impartiality. Cf., *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (a rule of "automatic reversal," without an inquiry into actual prejudice, is appropriate "only in a very limited class of cases"). Petitioner offers no challenge to the adequacy of voir dire here.

The appellate cases petitioner cites (Pet. 27 nn.6-7) likewise do not support a conclusive presumption of prejudice here. Indeed, most of the cases petitioner cites applied no presumption at all, rejected the pretrial-publicity claim, and denied relief. See, *e.g.*, *United States* v. *Higgs*, 353 F.3d 281, 307-308 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); *McVeigh*, 153 F.3d at 1181-1183; *Flamer* v. *Delaware*, 68 F.3d 736, 754-755 (3d Cir. 1995) (en banc) (Alito, J.), cert. denied, 516 U.S. 1088 (1996); *People* v. *Leonard*, 157 P.3d 973, 993-995 (Cal.), cert. denied, 552 U.S. 1013 (2007); see also *DeRosa* v. *State*, 89 P.3d 1124, 1136 (Okla. Crim. App. 2004) ("DeRosa does not contend that his case is one of the rare cases where media influence was so pervasive and prejudicial that prejudice must be presumed."), cert. denied, 543 U.S. 1063 (2005). And in the only case petitioner cites in which the court granted relief on a pretrial-publicity claim, the Ninth Circuit did not specifically address whether the presumption of prejudice could be rebutted in an appropriate case, perhaps because the relevant facts regarding pretrial publicity were not included in the record and the Ninth Circuit relied on the state supreme court's findings. See *Daniels* v. *Woodford*, 428 F.3d 1181, 1210-1211 (2005), cert. denied, 550 U.S. 968 (2007); cf. *Hamilton* v. *Ayers*, 583 F.3d 1100, 1107 (9th Cir. 2009) (juror was exposed to media coverage during trial, but presumption of prejudice was rebutted); *United States* v. *Keating*, 147 F.3d

895, 900 (9th Cir. 1998) (jurors were exposed to extrinsic evidence during trial, but presumption of prejudice was rebutted). The only circuits to have squarely addressed the question hold that the presumption *is* rebuttable. Pet. 26-27 n.5. Thus, even if this case presented the question whether a presumption of prejudice is rebuttable, petitioner cannot establish a circuit conflict warranting plenary review on that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
THOMAS E. PEREZ
Assistant Attorney General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys

DECEMBER 2010